

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal From Michigan Court of Appeals  
Saad, P.J., and Owens and Cooper, JJ.  
Affirming the Isabella County Circuit Court,

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PEOPLE OF THE STATE  
OF MICHIGAN,

Plaintiff-Appellant,

vs.

Supreme Court No. 121698

Court of Appeals No. 234661

Isabella Circuit Court No. 00-000337-AR

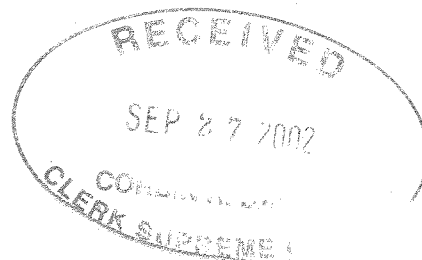
MICHAEL BRANDON SCHERF,

Defendant-Appellee.

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**BRIEF OF AMICUS CURIAE  
THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN**

Ronald J. Bretz (26532)  
Attorney for Amicus Curiae  
Thomas M. Cooley Law School  
300 S. Capitol Avenue – P.O. Box 13038  
Lansing, MI 48901-3038  
(517) 371-5140  
Laura A. Baluch, Research Assistant



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## **COUNTERSTATEMENT OF QUESTION PRESENTED**

**SHOULD THIS COURT CONTINUE TO REJECT THE GOOD FAITH EXCEPTION  
TO THE EXCLUSIONARY RULE UNDER THE MICHIGAN CONSTITUTION?**

Plaintiff-Appellant answers, “No.”

Defendant-Appellee answers, “Yes.”

Amicus Curiae answers, “Yes.”

## **STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

Amicus Curiae Criminal Defense Attorneys of Michigan accept and incorporate the Counter-Statement of Facts contained in the brief of Defendant-Appellee filed on September 27, 2002.

**THIS COURT SHOULD CONTINUE TO REJECT THE GOOD FAITH  
EXCEPTION TO THE EXCLUSIONARY RULE UNDER THE  
MICHIGAN CONSTITUTION.**

Michigan courts have traditionally excluded evidence seized by unconstitutional means. The purpose of the rule is to remedy these violations and to deter future violations. Creation of a “good faith” exception to this rule would unquestionably undermine the Michigan constitutional protection from unreasonable search and seizure. It would leave the people of this state without a remedy for many of these violations. The police officers’ knowledge of and respect for constitutional protections would decrease as would the attention paid by magistrates to the warrant requirements. To preserve the integrity of the Michigan constitution and the criminal justice process, this Court should continue the full enforcement of the exclusionary rule.

**A. THE EXCLUSIONARY RULE UNDER ARTICLE I, SECTION 20 OF  
THE MICHIGAN CONSTITUTION DOES NOT INCLUDE A GOOD  
FAITH EXCEPTION AS MICHIGAN PROVIDES GREATER  
PROTECTION THAN THAT PROVIDED BY THE FOURTH  
AMENDMENT OF THE UNITED STATES CONSTITUTION.**

This Court has long recognized its power to interpret the Michigan Constitution as granting its citizens more protection than the federal Constitution provides. In *People v. Marxhausen*, 204 Mich 559; 171 NW 557 (1919), this Court held that any evidence seized in violation of an individual’s Fourth Amendment constitutional rights must be excluded. This case was decided long before the federal courts applied the exclusionary rule to the states. The Court stated that if such evidence “can thus be seized and held and used...against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the constitution.” *Id.* at 571.

*Marxhausen* demonstrates the long tradition of the state of Michigan to grant its citizens more rights than the federal courts provide. This Court said that “these rights of the individual in his person and property should be held sacred, and any attempt to fritter them away under the guise of enforcing drastic sumptuary legislation (no matter how beneficial to the people it may be claimed to be), must meet with the clear and earnest disapproval of the courts.” *Id.* at 567. The federal courts did not apply the exclusionary rule to the states until over forty years later. *Mapp v. Ohio*, 367 US 643; 81 S Ct 1684 (1961).

When the Court applied the exclusionary rule in Michigan before it was adopted by the federal courts, it manifested the intent that Michigan citizens, when appropriate, can be afforded more rights than federal law provides. In *People v Sundling*, 153 Mich App 277, 292; 395 NW2d 308 (1986), in declining to implement the good faith exception, the court stated:

[O]ur Supreme Court adopted the exclusionary rule as the remedy for violations of the Michigan constitutional right to be free from unreasonable searches and seizures long before such a remedy was deemed required under the federal constitution. We maintain that its existence in its present form is a necessary ingredient to the preservation of the right under the Michigan constitution to be free of unreasonable government intrusions.

For many years both the federal and Michigan courts required that all evidence acquired through constitutional violations be excluded from use against a defendant. In 1984, the United States Supreme Court adopted the good faith exception to the exclusionary rule in *United States v Leon*, 468 US 897; 104 S Ct 3424 (1984). The Court emphasized that the sole purpose of the exclusionary rule was to deter police misconduct. The Court then held that evidence obtained by police officers who act in reasonable reliance on a search warrant issued by a neutral and detached magistrate will not be excluded even if it is later found that the warrant was not supported by probable cause. The *Leon* decision imposes a clear limitation on the reach of the



exclusionary rule. As a result, some evidence seized in clear violation of a person's Fourth Amendment rights can be admitted in evidence.

Michigan has properly continued to reject the adoption of a good faith exception to the exclusionary rule under the Michigan state constitution. This consistent precedent implicitly acknowledges that the exclusionary rule has a purpose other than police deterrence. In *Mapp v. Ohio*, *supra*, the Court described one of the purposes of the rule as preservation of judicial integrity. The *Mapp* Court sought to prevent disrespect for the law that would result if courts condoned violations of the Fourth Amendment. The court itself would become a lawbreaker. "If the Constitution is to have any meaning, it necessarily must provide a remedy whenever its terms are violated. The original – and sole – basis for the adoption of the Exclusionary Rule was founded upon a belief that the courts could not be willing conduits for governmental lawlessness." Simon, Paul, *The Fourth Amendment's Exclusionary Rule – Judicial Remedy or Constitutional Mandate: Is There Room for the "Good Faith" Exception?*, 41 S Tex L Rev 1101, 246.

Michigan is not the only state to reject the good faith exception. Fourteen states, including Michigan, have expressly rejected a good faith exception, granting their citizens more rights than are provided by the federal Constitution. Eleven states and the District of Columbia have judicially approved of a good faith exception through their state constitution. Five more states have adopted it via statute. Fischer, Christopher, *"I Hear You Knocking But You Can't Come In,"* 76 N Dak L Rev 123, Footnotes 201-204. Certainly, state courts are not required to apply the good faith exception.

Appellant argues that Michigan courts do not interpret the Michigan Constitution as providing more protections to its citizens. Initially, it is important to note that this Court

certainly has the right to do so. In *Cooper v California*, 386 US 58, 62 (1967), the United States Supreme Court held that a state had the “power to impose higher standards on searches and seizures than required by the Federal Constitution.” Moreover, the courts in Michigan have rejected the good faith doctrine on this basis. In *People v Jackson*, 180 Mich App 339, 346; 446 NW2d 891 (1989), the court held that, although the federal courts have adopted a good faith exception to the exclusionary rule, the Michigan courts “have declined to adopt a good faith exception, finding greater protection afforded defendant under our own state constitution.”

More recently, in *Sitz v Michigan Department of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993), this Court specifically stated that “our courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so. We are obligated to interpret our own organic instrument of government.” The *Sitz* Court went on to say that the state of Michigan can not “ignore the body of state constitutional search and seizure law’ created pursuant to ‘ the historical general power of this court to construe the constitutional provision relating to searches and seizures’” *Id.* at 762, quoting *People v Nash*, 418 Mich 196, 214; 341 NW2d 439 (1983). Furthermore, “we may not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection,” *Id.* at 759.

This Court has had the opportunity to adopt the good faith exception in several cases and has consistently rejected it. In *People v Bloyd*, 416 Mich 538; 331 NW2d 447 (1982), an officer held the defendant in custody without probable cause or a warrant. The Court held that the evidence had to be excluded despite the prosecution’s argument for adoption of the good faith exception. Quoting Justice Marshall in *Taylor v Alabama*, 457 US 687, 693; 102 S Ct 2664

(1982), this Court said, “To date we have not recognized such an exception, and we decline to do so here.” See also: *People v Sherbine*, 421 Mich 502; 364 NW2d 658 (1984), *People v Sloan*, 450 Mich 160, 201; 538 NW2d 380 (1995) (both decided after the United States Supreme Court adopted a good faith exception).

The Court of Appeals has also specifically rejected the good faith exception to the exclusionary rule. In *People v Tanis*, 153 Mich App 806; 396 NW2d 544 (1986), the court declined to adopt a good faith exception even though the federal courts had. Furthermore, in *People v Sundling, supra*, at 290, the court refused to adopt a good faith exception because “it is well established that a state can afford a defendant greater rights and protections under its own constitution than the United States Supreme Court has bestowed under the federal constitution.” Several other Michigan courts have also expressly rejected this exception to the exclusionary rule. *People v Sellars*, 153 Mich App 22, 28; 394 NW2d 133 (1986); *People v Perlos*, 170 Mich App 75, 91; 428 NW2d 685 (1987); *People v Landt*, 188 Mich App 234, 243; 469 NW2d 37 (1991); *People v Hill*, 192 Mich App 54, 56; 480 NW2d 594 (1991); *People v Paladino*, 204 Mich App 505, 507; 516 NW2d 113 (1994).

**B. ADOPTION OF THE GOOD FAITH EXCEPTION IN MICHIGAN WOULD INEVITABLY LEAD TO CONSTITUTIONAL VIOLATIONS DUE TO A LACK OF KNOWLEDGE OF WARRANT REQUIREMENTS BY THE POLICE AND CARELESS CONDUCT BY MAGISTRATES IN THE ISSUANCE OF WARRANTS.**

There are several reasons why the courts in Michigan and elsewhere have consistently rejected a good faith exception. In *People v David*, 119 Mich App 289, 297; 326 NW2d 485 (1982), the court concluded that the exception would swallow the rule:

[S]uch a holding would, in effect, remove the probable cause requirement from

the Fourth Amendment. A 'good-faith' exception to the exclusionary rule would insulate the magistrate's decision to grant a search warrant from appellate review. In every case where a constitutionally infirm search warrant was issued, the prosecution could reasonably claim that the police acted in good faith. In effect, the constitutional language that all warrants be issued only on a showing of probable cause would become a nullity.

In *State v Carter*, 322 NC 709, 716; 370 SE2d 553 (1988), the North Carolina Supreme Court expressed a similar concern:

If letters and private documents can be thus seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

The exclusionary rule is necessary for the state to maintain its citizens' faith in the Constitution. Exceptions to the rule would undermine that faith. As the *Mapp* Court noted forty years ago, exclusion of the illegally seized evidence is necessary to maintain the integrity of the courts.

The application of the good faith exception in Michigan would also result in an increase in illegal police activity. "Adoption of a 'good-faith' standard would remove the incentive for police officers to find out what sort of police conduct constitutes an unreasonable invasion of privacy." *People v David, supra* at 297. The *David* Court went on to assert that the good faith rule would provide an incentive to violate the law: "on a police force, efficiency in obtaining convictions is rewarded so recognition of a good-faith exception to the warrant requirement would encourage police officers to remain ignorant of the law in order to garner more evidence and obtain more convictions. The end result, increased illegal police activity, is the very problem that the exclusionary rule is designed to avert." *Id.* at 297-298.

If the police knew that a warrant would be valid with simply the magistrate's signature and the officer's reasonable good faith in the warrant, regardless of the requisite probable cause, there would be an increase in improper police techniques, whether intentional or not. It would be inevitable that police misconduct would ensue. If an officer could get a warrant without following proper warrant requirements, the result would be ignorance of the law by those entrusted to enforce it.

In *People v Sundling, supra*, at 292, the court explicitly "question[ed] the utility of the good-faith exception in light of the dearth of evidence indicating that application of the exclusionary rule substantially hinders effective and efficient law enforcement." Justice Brennan in his dissent in *Leon* added that the exclusionary rule actually leads to better police work :

If evidence is consistently excluded in these circumstances, police departments will surely be prompted to instruct their officers to devote greater care and attention to providing sufficient information to establish probable cause when applying for a warrant, and to review with some attention the form of the warrant that they have been issued, rather than automatically assuming that whatever document the magistrate has signed will necessarily comport with Fourth Amendment requirements. *United States v Leon*, 468 US 897, 955; 104 S Ct 3424 (1984) [Brennan, J., dissenting].

Unquestionably, the exclusionary rule requires a higher degree of diligence on the part of the police in Michigan. As a result, Michigan citizens are assured that the cherished protections of the Michigan Constitution will be honored. If this Court departs from years of sound precedent and practice, constitutional violations by the police would become the norm.

The Michigan exclusionary rule also requires magistrates to follow constitutional requirements when issuing a warrant. One of the primary jobs of a magistrate is to make the legal determination of whether probable cause exists. In making this decision, magistrates on the federal level are not required to be correct; they only need to be "close" in deciding the critical

question of probable cause. The exclusionary rule therefore, not only deters police misconduct but also misconduct and careless behavior by the magistrates who issue warrants. “Creation of this . . . exception for good-faith reliance upon a warrant implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will from now on have virtually no consequence.” *Id.* at 955. The good faith exception will lead to magistrates granting unconstitutional warrants. Despite a constitutional violation due to lack of care and attention given to the warrant process, the evidence seized will be admissible.

Rejection of the good faith exception will promote constitutional guarantees implicit in our legal system. It is imperative that the courts of Michigan continue to exclude evidence when the law has not been followed in the issuance of the warrant, no matter who made the error. “Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.” *State v Novembrino*, 105 NJ 95, 101; 519 A2d 820 (1987).

The purpose of applying the exclusionary rule to errors by magistrates in issuing warrants is not to punish the magistrates. As the Supreme Court noted in *Leon*, magistrates are by definition neutral. This fact led the *Leon* Court to conclude that magistrates would not be deterred from violating the law if the evidence is ultimately suppressed. However, as the Connecticut Supreme Court has noted, while there may be some deterrent effect for the bad magistrate, the more important purpose of applying the rule to magistrate errors is to educate the magistrates and promote decisions which comport with the Constitution:

In this sense, the issuing authority, when the determination of probable cause is overturned on appeal, is not being ‘punished’ for a mistake, but is, rather, being informed that a constitutional violation has taken place and is also being instructed in how to avoid such violations in the future. ‘In other words, the longstanding applicability of the exclusionary rule in with-warrant cases has served not only to deter the occasional ill-spirited magistrate, but more

importantly to influence judicial behavior more generally by . . . creating an “incentive to err on the side of constitutional behavior.’ *State v Marsala*, 216 Conn 150, 168; 579 A.2d 58 (1990), quoting *United States v. Johnson*, 457 U.S. 537, 561, 102 S.Ct. 2579 (1982).

In the instant case, the magistrate issued an arrest warrant without being provided an affidavit establishing probable cause. This is not a case like *Leon* where the magistrate was presented with an affidavit of probable cause which the Court determined was close but insufficient. Here, the magistrate was given nothing to show probable cause and yet issued a warrant anyway. If this Court decides that the good faith exception applies and permits the prosecution’s use of the evidence seized from the defendant at the time of his illegal arrest, it would effectively send the message that the police and probation officers no longer need to show probable cause to get an arrest warrant.

As noted, this Court has been presented with the good faith exception several times in the past and has consistently held that it will not apply to violations of the Michigan Constitution. If this exception is adopted, the integrity of the warrant process will inevitably be damaged. Magistrates will quickly learn that they do not need to give diligent consideration when determining if a warrant should be granted. Indeed, the message from this case would be that magistrates do not need any showing of probable cause if the request comes from a probation officer. Furthermore, there will be no motivation for police officers to learn and understand the requirements of the constitution. Instead, officers will unavoidably discover that reasonable good faith will allow their mistakes to be acceptable, regardless of the constitutional violations that take place.

While this Court has most recently indicated that it will not grant higher protections under the Michigan Constitution unless there is a compelling reason to do so, *Sitz, supra*, at 752,

there are many compelling reasons to reject the good faith rule. The state of Michigan cannot give up its long tradition of and adherence to the exclusionary rule. Adoption of the good faith exception will effectively gut the rule and result in an expansion of government violations of the state constitutional right to be free from unreasonable search and seizure.



REQUEST FOR RELIEF

AMICUS CURIAE, the Criminal Defense Attorneys of Michigan, respectfully request that this Honorable Court affirm the decision of the Court of Appeals and reject the Appellant's invitation to adopt the good faith exception to the exclusionary rule.

Respectfully Submitted,

Criminal Defense Attorneys of Michigan

By: 

Ronald J. Bretz (P26532)  
Attorney for Amicus Curiae  
Thomas M. Cooley Law School  
300 S. Capitol Avenue  
Lansing, MI 48933  
(517) 371-5140

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